

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING  
A JUDGE NO. 02-487

Supreme Court Case  
No.: SC03-1171

RESPONDENT’S SUPPLEMENTAL REPLY BRIEF IN  
SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE  
ON BEST EVIDENCE GROUNDS

Florida’s Best Evidence Rule provides that a duplicate is not admissible if a “genuine question is raised about the authenticity of the original or any other document or writing.” § 90.953(2), Fla. Stat. Respondent has moved to exclude the purported Holder papers because they do not satisfy Florida’s Best Evidence Rule. At the hearing on Respondent’s motion, the Special Counsel asked the Chairman of the Hearing Panel for the opportunity to file supplemental briefs on the issue of whether Respondent has raised a genuine question about the authenticity of the purported Holder papers. Respondent then set forth overwhelming evidence demonstrating that the purported Holder papers are fabrications, including the testimony of five eyewitnesses and the appearance of the document itself. *See* Resp’t’s Supplemental Br. in Support of Mot. in Limine to Exclude Evidence on Best Evidence Grounds at 5-6, 8-9 (Apr. 25, 2005) [“Supplemental Brief”].

In his brief in response, the Special Counsel now admits that Respondent has raised a genuine question regarding the authenticity of these documents: “Special Counsel has acknowledged that there is a genuine question as to the authenticity of the Holder paper.” *See* Comm’n’s Supplemental Br. in Resp. to Mot. in Limine to Exclude Evidence on Best Evidence Grounds at 2 (May 5, 2005) (emphasis added) [“Response”]. Special Counsel’s admission is the end of the matter—the purported Holder papers are inadmissible under Florida’s Best Evidence Rule.

The rest of the Special Counsel’s brief simply confuses the issue. Most of the Response does not deal with the Best Evidence Rule but, instead, attempts to argue an entirely separate issue—authentication. However, a duplicate must separately satisfy both the Best Evidence Rule and the authentication rule. As the Florida Supreme Court has explained, “The best evidence rule and the requirement that [evidence] be authenticated are not correlative as conceived by the trial court but are separate and independent rules of evidence, each with its own scope and purpose.” *Justus v. State*, 438 So. 2d 358, 365 (Fla. 1983) (emphasis added).<sup>1</sup>

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<sup>1</sup> Respondent has separately moved to exclude evidence on the grounds of authenticity—a motion that has been briefed and remains pending but upon which the Chairman has not ordered supplemental briefing. *See* Resp’t’s Motion in Limine to Exclude Evidence on Authentication Grounds (Aug. 25, 2004).

The Best Evidence Rule and the authentication requirement both involve authenticity concepts, but—as the Florida Supreme Court emphasized—the scope and applicable tests are drastically different.<sup>2</sup> The authentication rule, which applies to all types of physical evidence, requires that a proponent of a piece of evidence set forth a foundation of “evidence sufficient to support a finding that the matter in question is what its proponent claims.” § 90.901, Fla. Stat. *See also Justus*, 438 So.2d at 365. Once a proponent does so, the ultimate issue of authenticity is for the trier of fact. By contrast, the much narrower-in-scope Best Evidence Rule deals only with the admission of duplicates of documents and requires exclusion of a photocopy where a “genuine question is raised about the authenticity of the original or any other document or writing.” § 90.953(2), Fla. Stat. A genuine question about authenticity under § 90.953(2) is not, as the Special Counsel repeatedly suggests, a question for the trier of fact to resolve. It is a question already resolved by the Evidence Code. The Best Evidence Rule recognizes the heightened potential for fraud with respect to photocopies and operates to exclude duplicates when the origin of a copy is in doubt.

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<sup>2</sup> Indeed, the burden of persuasion is different under the two rules. The proponent of the evidence has the burden to set forth a prima facie case of authenticity whereas the opponent has the burden under the best evidence rule to raise a genuine question regarding authenticity.

Thus, the Special Counsel's arguments and reliance upon case law are misplaced. The Special Counsel has failed to cite a single decision that supports the admissibility of the purported Holder papers under the Best Evidence Rule. In his Response, the Special Counsel cites only two cases to attempt to support the admissibility of these papers. *See* Response at 4-5. However, neither of those is a best evidence case. In fact, neither decision even mentions the Best Evidence Rule or cites its statutory codification. Instead, these cases only concern the authentication requirement. *See ITT Real Estate Equities, Inc. v. Chandler Ins. Agency*, 617 So. 2d 750, 750 (Fla. 4th DCA 1993) (addressing only whether proponent of lease agreement satisfied the authentication predicate of § 90.901, Fla. Stat.); *State v. Love*, 691 So. 2d 620, 621-22 (Fla. 5th DCA 1997) (addressing only whether proponent of letter satisfied the authentication predicate of § 90.901). Indeed, neither of these decisions could have been governed by the Best Evidence Rule because each of them dealt with the admission of original documents—not photocopies. Therefore, the Special Counsel's cases are simply irrelevant.

The only cases cited by the parties that deal with the admission of photocopies are the best evidence cases cited by Respondent. *See* Supplemental Brief 6-8. In both *Osswald v. Anderson* and *United States v. Haddock*, courts held that photocopies should be excluded under the Best Evidence Rule because the opponent of the evidence raised a genuine question regarding authenticity. *See*

*Osswald v. Anderson*, 57 Cal. Rptr. 2d 23, 27 (Cal. Ct. App. 1996) (excluding copy of deed on best evidence grounds) [attached at Appendix 1]; *United States v. Haddock*, 956 F.2d 1534, 1545 (10th Cir. 1992) (excluding six photocopies on best evidence grounds because the opponent raised a genuine question regarding authenticity) [attached at Appendix 1], overruled on other grounds by *U.S. v. Gaudin*, 515 U.S. 506 (1995). Both cases are similar to the case at bar and strongly support the exclusion of the purported Holder papers.

The Special Counsel fails to distinguish these cases. In an unsuccessful effort to do so, the Special Counsel incorrectly suggests that these decisions deal with authentication rather than best evidence. *See* Response at 5 (characterizing *Osswald* as a case where “the proponent of the deed did not carry his burden of showing the authenticity of the copy”). That is plainly not the case. The court in *Osswald* clearly dealt with the Best Evidence Rule, not the authentication requirement. The court held that the opponent of the evidence “raised genuine questions regarding the authenticity of the original deed and the copy, thus invalidating the exception to the best evidence rule under [the equivalent of § 90.953, Fla. Stat.]” *Osswald*, 57 Cal. Rptr. at 27. Because there was a genuine question of authenticity, the evidence was inadmissible under the Best Evidence Rule.

The Special Counsel further suggests that when a genuine question is raised under § 90.953 and, therefore, the duplicate is inadmissible, it can still be admitted under § 90.954 if the original is unavailable. *See* Response at 3, 5. However, the Special Counsel does not cite a case in support of his position, which plainly is at odds with the holdings in *Osswald* and *Haddock*, where the courts did not go on to consider the admission of those documents under the equivalent of § 90.954. In fact, § 90.954 itself provides that evidence other than an original is admissible under that section “except as provided in § 90.953. (Emphasis added.) This makes sense, for if a duplicate cannot pass muster under § 90.953—either because there is a genuine question regarding its authenticity and/or because it would be unfair under the circumstances to admit the document—§ 90.954 should not provide an “end run” around those determinations.<sup>3</sup> *See Van Den Borre v. State*, 596 So. 2d 687, 690 (Fla. 4th DCA 1992) (“Although the Florida Evidence Code allows duplicates to be admitted in evidence, a genuine question about the authenticity of the *original* will prevent the admission of the duplicate.”).

The *Osswald* and *Haddock* courts have been joined by numerous other courts in not resorting to their jurisdiction’s equivalent of § 90.954 to override a

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<sup>3</sup> Importantly, both exceptions to the admissibility of duplicates under section 90.953 operate to prevent the admission of the purported Holder papers. *See* § 90.953(2)-(3), Fla. Stat. As the Special Counsel concedes, “there is a genuine question as to the authenticity of the Holder paper.” *See* Response at 2. Moreover, Respondent has shown that “it would be unfair, under the circumstance, to admit the [purported Holder papers].” § 90.953(3), Fla. Stat. *See* Resp’t’s Mot. in Limine to Exclude Evidence on Best Evidence Grounds at 9-10 (Aug. 25, 2004).

determination of inadmissibility under § 90.953. *See, e.g., Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 371 (2d Cir. 2003) (holding inadmissible a photocopy of a contract under the Best Evidence Rule both because a genuine question was raised as to authenticity and “it would be unfair to admit” it, despite the unavailability of the original); *Boswell v. Jasperson*, 266 F. Supp. 2d 1314, 1321 (D. Utah 2003) (holding copy of a “deed does not pass muster under the Best Evidence Rule” both because a genuine question was raised as to authenticity and it would be unfair under the circumstances to admit it despite the fact that the “original has not been produced”), *aff’d*, 109 Fed. Appx. 270, 274 (10th Cir. 2004); *Lozano v. Ashcroft*, 258 F.3d 1160, 1166 (10th Cir. 2001) (holding inadmissible a photocopy of an EEOC decision letter because of a genuine question regarding authenticity under the Best Evidence Rule despite the fact that original document was not available); *Lewis v. Smith*, 2003 WL 578619, at \*4 (Ohio Ct. App. Feb. 28, 2003) (holding inadmissible a photocopy of signed loan document because a genuine question was raised as to authenticity under the Best Evidence Rule and not analyzing whether it was admissible because original document was unavailable); *McCarthy v. Norwest Mortg. Closing Services, Inc.*, 1995 WL 146991, at \*2 (Minn. Ct. App. 1995) (affirming trial court holding that photocopy of employment contract was inadmissible because it would be unfair to admit it in light of genuine questions raised as to authenticity and specifically rejecting

argument that copy was admissible under equivalent of § 90.954 due to unavailability of original).<sup>4</sup>

Indeed, Respondent has not only raised a genuine question under the best evidence rule, but he has set forth substantial evidence that the purported Holder papers are not authentic copies of the paper he submitted to the Air War College. The only five eyewitnesses who saw Respondent's actual paper near the time he submitted it have all given sworn statements that refute the authenticity of the purported Holder paper. *See* Supplemental Br. at 5-6. Further, as in *Osswald* and *Haddock*, the proponent of the evidence could not explain the source of the document. In addition, the appearance of the purported Holder paper further undermines its authenticity. Respondent's paper would have been time and date stamped according to Air War College standard procedure, but the purported Holder papers bear no such stamp. *See id.* Similarly, the purported Holder papers lack the normal indicia of authenticity placed upon papers by the Air War College grader, including concluding handwritten comments, a handwritten grade, and a signed, typed letter giving formal remarks and the student's grade. *See id.*

Moreover, in the case at bar, the evidence has been tampered with. In fact, a significant portion of the evidence—the anonymous note and envelope

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<sup>4</sup> In each of these cases, the courts applied Best Evidence Rules similar to Florida's rule. *Compare* §§ 90.953-954, Fla. Stat. *with* Fed. R. Evid. 1003-1004, Ohio Evid. R. 1003-1004, and Minn. R. Evid. 1003-1004.



accompanying the purported Holder paper—has mysteriously disappeared. *See id.* at 9; *See also* Respondent’s Motion to Dismiss the Pending Charges or In Limine to Exclude the Purported Holder Paper and Hoard Paper Based on Evidentiary Improprieties and Incorporated Memorandum Of Law (March 18, 2005). The unfairness to Respondent of admitting the purported Holder papers is compounded by the fact that he has been prevented from investigating the disappearance of these items by restrictions placed by the U.S. Attorney on the testimony of his employees. *See* Motion in Limine to Exclude Testimony of Jeffrey Downing (August 25, 2004); Motion in Limine to Exclude Testimony of Jeffrey John Del Fuoco (August 25, 2004).

In light of this evidence, the purported Holder papers must be excluded from evidence under the Best Evidence Rule. Not only has Respondent raised a genuine question regarding authenticity (as Special Counsel concedes) but also, in light of the overwhelming evidence that the purported Holder papers are not duplicates of the paper Respondent actually prepared, it would be “unfair under the circumstances” to admit a photocopy that clearly could have been fabricated. § 90.953(3), Fla. Stat. No court has held that such duplicates are admissible. Indeed, the purpose of the Best Evidence Rule is to exclude documents under these precise circumstances.

For the foregoing reasons and those set forth in Respondent's initial Motion and in his Supplemental Brief, the purported Holder papers must be excluded from evidence.

Dated: May 16, 2005

Respectfully Submitted,

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### CERTIFICATE OF SERVICE

I certify that on May 16, 2005, a copy of the foregoing Respondent's Supplemental Reply Brief in Support of Motion in Limine to Exclude Evidence on Best Evidence Grounds has been served by U.S. Mail to: Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629. A courtesy copy has been provided via telecopier to Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501.

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